

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



76-1369

ORIGINAL  
To be argued by  
STUART WADLER

In The  
**United States Court of Appeals**  
For The Second Circuit  
UNITED STATES OF AMERICA,

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Pys

*Plaintiff-Appellee,*

vs.

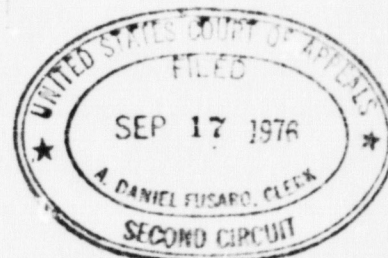
HUI SING SZE,

*Defendant-Appellant.*

*On Appeal from the United States District Court for the  
Southern District of New York.*

**BRIEF FOR DEFENDANT-APPELLANT**

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## BRIEF ON APPEAL

This matter comes before the Court on Appeal from a decision of the Honorable Charles L. Brieant, Jr. of the Southern District Court of New York, dated July 9, 1976 which decision denied defendant-appellant's motion to vacate his plea of guilty.

### FACTS

Defendant-appellant, a thirty year old Chinese alien, with a minimal comprehension of the English language was arrested, charged, and ultimately indicted for the crimes of bribery and conspiracy to commit bribery.

Defendant-appellant originally pleaded not guilty to both charges. The charge of bribery was dropped and defendant-appellant, on March 31, 1975, pleaded guilty to a charge of conspiracy to commit bribery. Defendant-appellant's plea of guilty was accepted. He was subsequently sentenced to and served three months in prison. On or about April 21, 1976, defendant-appellant consulted with present counsel regarding his immigration status, and in connection therewith, the matter of the plea of guilty, referred to hereinabove, was discussed.

It was as a result of such discussion that defendant-appellant, by notice of motion filed May 26, 1976, moved to vacate his plea of guilty.



ISSUES ON APPEAL

I.

DID NOT THE COURT ERR IN ACCEPTING  
DEFENDANT-APPELLANT'S PLEA OF GUILTY  
WHERE IT HAD BASIS TO BELIEVE THAT  
SUCH PLEA WAS BASED UPON UNDISCLOSED  
PROMISES?

II.

IS IT NOT REVERSABLE ERROR TO ACCEPT  
A PLEA OF GUILTY WHERE, UPON QUESTION-  
ING, THE DEFENDANT-APPELLANT DENIES GUILT  
OF ALL OF THE ELEMENTS OF THE CRIME  
WITH WHICH HE HAS BEEN CHARGED?

III.

IS IT NOT A DENIAL OF DUE PROCESS  
WHERE DEFENDANT-APPELLANT REQUIRES  
AND DOES NOT HAVE COMPETANT INTER-  
PRETER SERVICES?

ARGUMENT

I.

DID NOT THE COURT ERR IN ACCEPTING  
DEFENDANT-APPELLANT'S PLEA OF GUILTY  
WHERE IT HAD BASIS TO BELIEVE THAT  
SUCH PLEA WAS BASED UPON UNDISCLOSED  
PROMISES?

Rule 11 of the Federal Rules of Criminal Procedure states, in  
part, as follows:

"A defendant may plead not guilty,

guilty, or, with the consent of the Court, 'nolo contendere.' T The Court may refuse to accept a plea of guilty, and shall not accept (emphasis supplied) such plea or a plea of 'nolo contendere' without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea..."

The transcript of the proceedings at which defendant-appellant pleaded guilty (Appendix pgs. 19A-20A) contains the following exchange:

Q: "Have you been induced to offer to plead guilty by reason of any promises, statements or predictions by anyone to the effect that you would get leniency or special treatment or consideration if you pleaded guilty instead of going to trial?"

A: "Yes." (emphasis supplied)

Q: "Have you been induced to plead guilty by reason of any fear, pressure, force or the like?"

A: "No."

Q: "I asked you a moment ago, had you been induced to offer to plead guilty by reason of any promise. I don't think I heard your answer.

Are you pleading guilty because you believe you are guilty or because of some promises or statements or predictions made to you by somebody?"

Interpreter:

"He says no."

"He says no" to what? "Are you pleading guilty because you



believe you are guilty..." "He says no," or "Are you pleading guilty because...of some promises, or statement or prediction made to you by somebody?" "He says no." Obviously, the statement, "He says no," is ambiguous. It leave room for interpretation and demands further examination. The record, (Appendix p. 20A) goes on as follows:

COURT: "I thought he might have said yes. It wasn't clear to me what he said."

MR. KURIANSKY: "I thought I heard yes, too. He may have been answering whether or not he understood what you had said. I'm not sure."

Apparantly, not only is the Court confused at this point, but Mr. Kuriansky, the then attorney for the government is equally confused as to whether the defendant-appellant's plea of guilty is voluntary, (as required by Rule 11 of the Federal Rules of Criminal Procadure), or in the alternative, is based upon undisclosed promises. The record, (Appendix p. 20A) continues as follows:

Q: "Have you been induced to offer to plead guilty by reason of any promises, statements, or predictions by anyone to the effect you would get leniency or special treatment or special consideration if you plead guilty instead of going to trial?"

INTERPRETER: "The lawyer explained it to him."

What did the lawyer explain to him? Did the lawyer explain to him to plead guilty only if you are guilty? We must doubt that, inasmuch as the entire record, as hereinafter cited (see Point II of Argument) shows the defendant-appellant not only did not believe himself guilty,



but in fact denied each and every action that would constitute the commission of the crime with which he was charged.

"The lawyer explained it to him." Is it not more reasonable to believe that what the lawyer explained to him was a plea of guilty would result in a lesser sentence? In no sentence at all?

Practitioners of the law, guardians of the law, if you will, advocates and jurists alike are required to use reason and logic, to delve beyond the facade of mere verbiage to determine its meaning and intent.

"The lawyer explained it to him." It is respectfully submitted that this revealing comment, especially coupled with defendant-appellant's answer of "yes" to the Court's original question of inducement to plead guilty, is clearly and unquestionably an affirmation by the defendant-appellant that he had been induced to plead guilty as a result of undisclosed promises. The record goes on (Appendix p. 21A) as follows:

COURT: "Are you pleading guilty because you believe you are guilty or are you pleading guilty because somebody made a promise or statement or prediction to you that you would get leniency or special treatment or consideration if you pleaded guilty instead of going to trial? Which is it?"

A: "No, I feel this way myself."

Once again, the answer is not responsive. "Which is it?" Answer, "No, I feel this way myself." The answer is at the least, ambiguous. The question being two-fold, the defendant-appellant's

response tells us nothing.

The Courts inquiry as to whether the defendant-appellant has been induced to plead guilty ends with the following exchange: (Appendix p.21A)

Q: "Are you pleading guilty solely because you believe you are guilty?"

A: "Yes."

Does this final exchange erase all of the preceeding ambiguity? Does it justify the conclusion that defendant-appellant's plea of guilty is purely voluntary and not based upon inducement? Does it satisfy the requiriements of Rule 11 of the Federal Rules of Criminal Procedure?

We respectfully submit that this final exchange does not clear up the prior ambiguities, does not justify the conclusion that defendant-appellant's plea was voluntary; nor does it satisfy the requirement of Rule 11 of the Federal Rules of Criminal Procedure.

"Are you pleading guilty solely because you believe you are guilty?" Guilty of what? Guilty of conspiring to commit bribery? Certainly not! As we will shortly discuss (Argument Point II), defendant-appellant not only did not believe himself guilty, not only denied each and every element of the crime of conspiracy but even states categorically that he didn't know anything he did was illegal.

Guilty of what? Guilty of wanting to buy a "Green Card for himself? Yes! It is clear from the record that defendant-appellant feels guilt for his desire to purchase a "Green Card" for himself. However, it is equally clear that defendant-appellant neither



bought a "Green Card" for himself nor is he charged with doing so.

It is important, at this point to note defendant-appellant's statements in his affidavit in support of the motion to vacate his plea of guilty: (Appendix p.49A )

"I did not want to plead guilty to this charge as I did not commit the acts alleged..."

and (Appendix p. 51A):

"I was, in fact, promised that I would not serve any time in jail if I pleaded guilty..."

A reading of the transcript clearly establishes that the defendant-appellant felt guilty only of his desire to buy a "Green Card." There can be no doubt that his plea of guilty was, at the very least, ambiguous. The record clearly indicates that the defendant-appellant's plea was based upon some undisclosed promises and factually falls within the purview of Rule 11 of the Federal Rules of Criminal Procedure.

#### ARGUMENT

#### II.

IS IT NOT REVERSABLE ERROR TO ACCEPT A PLEA OF GUILTY WHERE, UPON QUESTIONING, THE DEFENDANT-APPELLANT DENIES GUILT OF ALL OF THE ELEMENTS OF THE CRIME WITH WHICH HE HAS BEEN CHARGED?

Defendant-appellant pleaded guilty to a single count of conspiracy to commit bribery. Assuming arguendo, that defendant-appellant's

plea of guilty was in all other respects proper, he, at the time of his plea, repeatedly denied guilt of all of the elements that comprise the charge of conspiracy to commit bribery.

Rule 11 of the Federal Rules of Criminal Procedure states in part as follows:

"The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

Judge Brieant asked defendant-appellant (Appendix p.22A ):

"Did you agree with some other person that you would pay money to Granelli and Kibble at \$4,000 per card for Green Cards in behalf of other persons?"

A: (THE INTERPRETER)

"He didn't say so."

Again (Appendix p. 23A) the Judge in questioning the defendant-appellant and referring to one Eddie Chow, an alleged co-conspirator, inquired:

Q: "Did you have any business dealing with him?"

A: "No."

(Appendix p. 25A) Q: "What was your arrangement with the other defendants, if any?"

A: "No, nothing, none."

The record goes on as follows: (Appendix p.25A )

MR.SINGER: (Defendant-appellant's then attorney)

"Can I have a short recess, your honor?"  
"The way my client describes this to me was that he had an agreement to buy it for himself."



and once again (Appendix p. 26A):

Q: "Did you have an agreement with any other person to obtain cards for third persons for money?"

INTERPRETER: "He never thought that way. He wants to get one for himself."

The record clearly shows that notwithstanding the plea to the crime of conspiracy to commit bribery, the defendant-appellant, under questioning by Judge Brieant, repeatedly denies the acts that would establish his guilt. Though, admittedly, defendant-appellant acknowledged that he told one Pang Sang Ping that one Eddie Chow will take care of everything, and further acknowledged that he advised one Eddie Chow to contact Pang Sang Ping, those acknowledgements were not only made in the English language without the use of an interpreter but they, in and of themselves and especially in light of defendant-appellant's denials as cited above, do not constitute an admission of the crime of conspiracy to commit bribery. Certainly, these acknowledgements, considered against the background of defendant-appellant's repeated denials of actions constituting the crime with which he was charged clearly raised substantial doubt as to the plea of guilty being based upon defendant-appellant's belief in his guilt.

Defendant-appellant denied his guilt and every act which would constitute an admission of guilt, yet the Court accepted his plea of guilty and we put it to you that the Court erred in doing so.



ARGUMENT

III

IS IT NOT A DENIAL OF DUE PROCESS  
WHERE DEFENDANT-APPELLANT REQUIRES  
AND DOES NOT HAVE COMPETANT INTER-  
PRETER SERVICES?

There can be no question but that the denial of competant interpreter services where required is a denial of due process. The question that arises here is two-fold: namely, did Defendant-appellant require the services of a competant interpreter and were such services in fact provided?

The record is clear, The defendant-appellant required the services of a competant interpreter and the Court took judicial notice of this by providing an interpreter, and at least initially, conducting its examination through an interpreter. Defendant-appellant denied an adequate knowledge of the English language. (Appendix p. 15A)

Q: "Do you read, write, speak, or understand any English?"

A: "Not too much."

and again: (Appendix 27A)

Q: "You understand pretty much English, don't you?"

A: "Some of them. About the law, I really don't understand."

The record, having establish that the Court believed an interpreter was required, and that defendant-appellant's limited knowledge of

English required the use of an interpreter. The question that remains is was a competent interpreter provided?

There is no question that an interpreter was provided and we do not question the interpreter's competence in whatever dialect of the Chinese language she may be expert in. However, in this instant case, the best judge of the competency of the interpreter in communicating with the defendant-appellant in the specific case under consideration should be the Honorable Charles L. Brieant, Jr. To get Judge Brieant's evaluation of the competency of the interpreter, we merely turn to the Transcript after defendant-appellant has been responding in the English language. We find Judge Brieant stating as follows: (Appendix p. 27A)

Q: "I think your English is better than the Chinese you are getting second hand."

There can be no other interpretation of Judge Brieant's remarks than that he clearly and unequivocally recognized the incompetence of the translation and interpretation of the Court appointed interpreter at least in this instant case.

Defendant-appellant in his affidavit in support of the motion to vacate the plea (Appendix p. 50A ) stated:

"It is important to know that the interpreter spoke Mandarin a Chinese dialect, whereas I spoke Cantonese, and have minimum understanding of the Mandarin dialect."

Defendant-appellant said he needed an interpreter. The Court agreed, and provided one. The Court acknowledged the incompetence of the interpreter. Defendant-appellant was denied competent interpreter services by



the Court. The resultant lack of proper and clear communication with defendant-appellant denied him his rights of due process.

#### CONCLUSION

In order to properly accept a plea of guilty, it is incumbent upon the Court to clearly establish, through diligent examination of the defendant, that his plea is voluntarily made without any form of inducement and is made with full knowledge and understanding of that to which he pleads (see Rule 11-Federal Rules of Criminal Procedure; 18 U.S.C.A. 15 - 164).

In the instant case, the record read in its entirety, leads to the conclusion that the defendant-appellant did not plead guilty because he believed he was guilty as charged but rather because of promises or predictions made to him.

Defendant-appellant's sworn statement that he pleaded guilty because of his then counsel's assurance that he would not be sentenced is overwhelmingly supported by the record.

Defendant-appellant's repeated denials of actions which would constitute the crime with which he was charged casts further doubt that his plea of guilty was based upon a belief in his guilt.

The obvious lack of communications between the defendant-appellant and the Court interpreter as attested to by defendant-appellant in his sworn statement (Appendix p. 50A), evidenced by his non-responsive answers and supported by Judge Briant's comment "...the Chinese you are getting second hand." (Appendix p. 27A) casts a shadow over the entire

proceedings. How can one voluntarily plea where one can not freely communicate? How can a plea be based upon understanding where one can not be freely communicated with?

The lack of a competent interpreter denied defendant-appellant the most basic and elemental of all rights. It effectively denied him of due process.

The record clearly establishes that defendant-appellant neither comprehended what he was being charged with; nor voluntarily pleaded guilty but rather followed what he believed was his then attorney's advice.

In view of the foregoing, defendant-appellant respectfully seeks an order setting aside the decision of Judge Brieant; vacating defendant-appellant's plea of guilty and for such other, further and different relief as to this Court may deem just and proper in the premises.

Respectfully submitted,

---

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**UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT**

**UNITED STATES OF AMERICA,**

**Plaintiff-Appellee,**  
- against -

**HUI SING SZE,**

**Defendant-Appellant.**

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Reuben A. Shearer being duly sworn,  
depose and say that deponent is not a party to the action, is over 18 years of age and resides at  
211 West 144th Street, New York, New York 10030  
That on the 17th day of September 1976 at 1 St. Andrews Plaza New York, N.Y. 10007  
deponent served the annexed *appellant's brief* upon

**Ira Block, U.S. Attorney**

the **Plaintiff-Appellee** in this action by delivering a true copy thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the herein,

Sworn to before me, this 17th  
day of September 1976

*Beth A. Hirsh*

BETH A. HIRSH  
NOTARY PUBLIC, State of New York  
No. 44-4003,000  
Qualified in Queens County  
Commission Expires March 30, 1978

*Reuben Shearer*  
Reuben Shearer